IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 385 of 1994

For Approval and Signature:

Hon'ble MR.JUSTICE M.H.KADRI
and
Hon'ble MR.JUSTICE SHARAD D.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

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SHAIKH MOHMEDKHAN BADARKHAN

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 385 of 1994

MR BD KARIA for Petitioner No. 1-3

Mr.A.J.Desai, learned A.P.P.for Respondent No. 1

CORAM : MR.JUSTICE M.H.KADRI
and
MR.JUSTICE SHARAD D.DAVE

Date of decision: 30/07/2002

ORAL JUDGEMENT

(Per : MR.JUSTICE M.H.KADRI)

1. The appellants-original accused nos. 1, 2 & 3 by filing this appeal under Sec. 374(2) of the Code of Criminal Procedure (to be referred to as the Code for short) have challenged the judgment and order dated March 18, 1994 passed by the learned Addl.Sessions Judge, Mehsana in Sessions Case no. 226/93 by which judgment and order all the appellants were convicted for causing the murder of deceased Fakirmohmed and for the offence of attempt to commit murder of p.w. 2 Bhikhankhan Fakirmohmed with the aid of Sec. 34 of Indian Penal Code and were sentenced to rigorous imprisonment for life and fine of Rs.2,000/- in default rigorous imprisonment for six months for the offence under Sec. 302 read with Sec. 34 of Indian Penal Code and for the offence under Sec. 307 read with Sec. 34 of Indian Penal Code and sentenced to suffer rigorous imprisonment for 5 years and fine of Rs.2,000/- in default rigorous imprisonment for six months. Both the sentences imposed on each of the appellants were ordered to run concurrently. No separate sentence was passed under Sec. 324 of Indian Penal Code. However, the appellants came to be acquitted for the offence under sec. 135 of the Bombay Police Act.

2. In brief the prosecution case be summarized as under : Deceased Fakirmohmed Ismailkhan was residing at village Lalavada, Taluka : Kheralu, District : Mehsana. Fakirmohmed had three sons - Bhikhankhan, Himmatkhan and Ashrafkhan. P.W. no. 1 Saberaben is the wife of Himmatkhan. Deceased Fakirmohmed was staying with Himmatkhan and his wife p.w. 1 Saberaben. P.W. 2 Bhikhankhan and third son of Fakirmohmed namely Ashrafkhan were married to accused no. 5 Meherbibi and accused no. 4 Nanniben respectively. The accused no. 4 and accused no. 5 were the daughters of one Badarkhan. The accused no. 1 Mohmedkhan, accused no. 2 Amirbhai and accused no. 3 Bhurekhan were the sons of Badarkhan. The accused nos. 4 & 5 are the sisters of accused nos. 1,2 & 3. It is the prosecution case that accused Bhurekhan and p.w. 2 Bhikhankhan had contested the election of Gram Panchayat which was held on 23.2.92. In the said election, accused no. 3 Bhurekhan had lost whereas p.w. 2 Bhikhankhan had won the election. As the accused no. 3 had lost the election, there was ill feeling between the accused no. 3 and p.w. 2 Bhikhankhan. The accused no. 4 & 5 who were married with two brothers Bhikhankhan and Ashrafkhan were staying separately since last 5 to 6 months of the date of the incident. Both the accused no. 4 & 5 were residing with their brothers. It is also the prosecution case that

accused no. 1 Mohmedkhan had given an axe blow to one Abdulkhan and in that case p.w. 2 Bhikhankhan was witness and therefore also there was ill feeling between the two families of Fakirmohmed and Badarkhan.

On May 25, 1993 around 9.00 a.m. deceased Fakirmohmed was coming out from his office cum residence, at that time all the three accused persons came from the back side of the deceased and tried to give kick and fist blows to the deceased. The accused no. 1 & 2 were armed with knives. It is the case of the prosecution that the accused no. 3 caught hold of deceased Fakirmohmed whereas the accused no. 2 Amirbhai gave a knife blow on the abdominal part of the deceased. Meantime, p.w. 2 Bhikhankhan ran to rescue the deceased and due to the intervention of p.w. 2 Bhikhankhan he was also caught hold by the accused no. 1 Mohmedkhan and accused no. 1 & 2 had given knife blows to p.w. 2 Bhikhankhan. Ashrafkhan who is the third son of deceased Fakirmohmed came at the place of the incident where two injured persons were lying and took them to his house. One tractor was called and in that tractor both the injured persons viz. Fakirmohmed and Bhikhankhan were taken to the Community Health Centre at Kheralu. P.w. 3 Dr.Tushar Shetalwad examined the deceased Fakirmohmed and p.w. 2 Bhikhankhan and both were transferred to Civil Hospital, Mehsana. The record reveals that from the Civil Hospital Mehsana, both the injured were referred to Civil Hospital, Ahmedabad. P.W. 10 Dr. Ghasura had performed the operation on deceased Fakirmohmed. Due to complications arisen because of the injuries and as sceptic had developed in the abdominal part of the deceased he succumbed to the injuries on May 27, 1993 in Civil Hospital, Ahmedabad. P.W. 2 Bhikhankhan was kept as an indoor patient in the Civil Hospital, Ahmedabad till June 4, 1993.

P.W. 1 Saberaben w/o Himmatkhan who is said to have witnessed the incident had lodged F.I.R. before P.W. 12 P.S.I. Chauhan on May 25, 1993 at 17.15 hrs. against the three appellants and accused no. 4 Nanniben and accused no. 5 Meherbibi which came to be registered as I C.R.No. 96/93 of Vadnagar police station. P.S.I. K.D.Chauhan went to the place of the incident and had drawn the panchanama and had collected scabbard of a knife as well as other incriminating articles from the place of the incident. He recorded the statements of Amjadkhan Imamkhan and other witnesses. Further statement of p.w. 1 Saberaben was recorded on May 26, 1993. P.S.I. Chauhan had gone to the Civil Hospital where the two injured persons viz. Fakirmohmed and

Bhikhankhan were transferred. P.S.I. had sent the yadi to the Executive Magistrate for recording the dying declaration of injured Bhikhankhan. Accordingly, p.w.9 Executive Magistrate Baldevbhai Rambhai Patel had recorded the dying declaration of p.w. 2 Bhikhankhan on May 29, 1993. Inquest of body of deceased Fakirmohmed was held and thereafter the dead body was sent for post-mortem. P.W. 13 Dr.Vijay Shah of Civil Hospital, Ahmedabad had performed the post-mortem of the dead body of Fakirmohmed. P.S.I.Chauhan had collected clothes put on by deceased Fakirmohmed as well as clothes put on by p.w. 2 Bhikhankhan at the time of the incident. After the arrest of the accused persons, P.S.I.Chauhan had recorded the statement of one Shekhubhai Fakirbhai. When the accused persons were in custody, they had shown their willingness to produce the incriminating articles namely knives used by them in inflicting injuries on deceased Fakirmohmed and p.w. 2 Bhikhankhan. Accordingly, independent persons were called and in their presence muddammal articles knives were recovered by drawing panchanama under Sec. 27 of the Evidence Act. P.S.I. Chauhan had sent all the incriminating articles to Forensic Science Laboratory (F.S.L. for short) for analysis. P.S.I.Chauhan had collected the injury certificates of deceased Fakirmohmed and p.w. 2 Bhikhahkhan from Community Health Centre, Kheralu and Civil Hospital, Ahmedabad. The post-mortem notes of the deceased Fakirmohmed was also collected from the Civil Hospital, Ahmedabad. On the completion of the investigation and on receipt of the report of F.S.L., the chargesheet against the appellants came to be filed by P.S.I.Chauhan in the Court of learned Judicial Magistrate, First Class, Vadnagar for offences punishable under Sec. 302, 307, 324, 147, 148, 149, 504 of Indian Penal Code and under Sec. 135 of the Bombay Police Act. The chargesheet came to be numbered as Criminal case no. 253/93 of the Court of J.M.F.C., Vadnagar. As the offence under Sec. 302 is exclusively triable by the court of Sessions, the learned Judicial Magistrate, First Class, Vadnagar by order dated October 1, 1993 committed the case to the court of Sessions at Mehsana wherein it came to be numbered as Sessions Case no. 226/93.

Charge exh. 10 was framed against the appellants and original accused no. 4 & 5 for the offences under Sec. 302 read with Sec. 34, under Sec. 307 read with Sec. 34 and under Sec. 324, 323 read with Sec. 34 of I.P.C. and under Sec. 135 of the Bombay Police Act. The charge was read over and explained to the appellants and the original accused no. 4 & 5 wherein they pleaded not guilty and claimed to be tried.

In order to prove the charge against the original accused, the prosecution examined i) p.w.1 Saberaben Himmatkhan exh. 20, ii) p.w.2 injured witness Bhikhankhan Fakirmohmed Qureshi exh. 21, iii) p.w.3 Dr.Tusharbhai Mohanbhai Shetalwad, Community Health Centre Kheralu at exh. 32, iv) p.w.4 Dr.Ritaben Pravinchand Shah, Medical officer of Civil Hospital at exh. 37, v) p.w.5 Panch Dosubhai Kalubhai Shaikh at exh. 41, vi) p.w.6 eye witness Amjadkhan Imamkhan Qureshi at exh. 43, vii) p.w.7 Panch Thakore Sendhaji Chenaji of discovery panchanama at exh. 44, viii) p.w.8 Panch Raval Ishwarbhai Amthabhai at exh. 46, ix) p.w.9 Executive Magistrate Baldevbhai Rambhai Patel at exh. 53, x) p.w.10 Dr.Ayubkhan Akbarkhan Ghasura who performed the operation on Fakirmohmed at exh. 58, xi) p.w.11 Police Head Constable Karshangiri Gangagiri at exh. 60, xii) p.w.12 Investigating Officer P.S.I. Kansinh Dudhsinh Chauhan at exh. 62, xiii) p.w.13 Dr.Vijay Rajnikant Shah who performed post-mortem of Fakirmohmed at exh. 69, xiv) p.w. 14 unarmed head constable Jethabhai Ganeshbhai Chaudhary at exh. 71, xv) p.w. 15 Panch Bapuji Bhemaji at exh. 74 and xvi) p.w. 16 Police Head Constable Kishorsinh Chhagansinh at exh. 75.

The prosecution produced the documentary evidence such as injury certificates of deceased Fakirmohmed and injured Bhikhankhan at exh. 33 & 34, injury certificate of accused no. 4 Nanniben at exh. 35, injury certificate of accused no. 5 Meherbibi at exh. 36, injury certificate of Civil Hospital, Ahmedabad of p.w. 2 Bhikhankhan, Panchanama of the scene of offence at exh. 42, panchanama of discovery of knife from the accused no. 1 at exh. 45, discovery panchanama of knife at the instance of accused no. 2 at exh. 47, dying declaration recorded of p.w. 2 Bhikhankhan at exh. 54, case papers of deceased Fakirmohmed at exh. 59, FIR lodged by p.w. 1 Saberaben at exh. 63, statement cum dying declaration of deceased Fakirmohmed at exh. 64, post-mortem notes exh. 70 etc. to prove the case against the appellants and original accused no. 4 & 5.

After the evidence of the prosecution was over, the accused persons were questioned by the learned Addl.Sessions Judge with regard to their explanation against the evidence led by the prosecution and their statements came to be recorded under Sec. 313 of the Code of Criminal Procedure. The defence of the appellants was of general denial. The original accused no. 4 & 5 in their further statements stated that both the sisters namely Nanniben and Meherbibi were proceeding

to their field for taking fodder on the day of the incident and when they reached near the office cum residence of deceased Fakirmohmed who was their father-in-law, deceased and p.w. 2 Bhikhankhan and youngest brother of Bhikhankhan i.e. Ashrafkhan were sitting near the office. It was stated that all the three persons called them and started beating. Ashraf had given a push to Nanniben and had inflicted a knife injury on the nose of Nanniben. When both of them had raised shouts, the accused no. 2 arrived at the place where the incident had taken place and had snatched away the knife from Ashrafkhan. It is stated that in that scuffle Bhikhankhan and Fakirmohmed had sustained injuries by knife. It was stated that the accused no. 1 and 3 were not present at the place of the incident. The accused no. 5 Meherbibi tendered her written reply at the time of recording her further statement in which she stated that p.w. 2 Bhikhankhan and his brother Ashrafkhan were demanding expenses of the election from her and were causing mental as well as physical cruelty on her. It was stated that as a result of the cruelty she was forced to take poison on January 8, 1992 and was admitted in Dr.Memon's hospital at Kheralu. It was stated that both the accused no. 4 & 5 were driven out of their matrimonial home by the two brothers namely p.w. 2 Bhikhankhan and his youngest brother Ashrafkhan. It was stated that false case was lodged against their brothers just to take revenge of the dispute which had taken place after the Gram Panchayat elections.

Learned Addl.Sessions Judge on the appreciation of oral as well as documentary evidence and after hearing the arguments advanced by the respective advocates of the parties, deduced that the deceased Fakirmohmed had died a homicidal death. It was further held that the prosecution had proved beyond doubt that all the three appellants had common intention of causing murder of Fakirmohmed as well as to cause grievous injuries on p.w. 2 Bhikhankhan. It was further held by the learned Addl.Sessions Judge that the accused no. 1 and 2, to fulfil their design of causing murder of deceased Fakirmohmed and also to cause murder of p.w. 2 Bhikhankhan, had armed themselves with deadly weapons namely knives. It was concluded that original accused no. 4 & 5 had no common intention with other accused persons to cause the murder of Fakirmohmed or to cause grievous injuries to p.w. 2 Bhikhankhan. On the basis of above referred conclusions, the learned Addl. Sessions Judge, by the impugned judgment and order acquitted the accused no. 4 & 5 namely Nanniben and Meherbibi from the charges framed against them however,

convicted the appellant nos. 1,2 & 3 for the offences of murder of deceased Fakirmohmed which was punishable under Sec. 302 read with Sec. 34 I.P.C. and for the offence under Sec. 307 read with Sec. 34 I.P.C. of attempt to commit the murder of p.w. 2 Bhikhankhan and sentenced each of the appellant for rigorous imprisonment for life and fine of Rs.2,000/- in default rigorous imprisonment for six months for offences under Sec. 302 read with Sec. 34 I.P.C. and further convicted all the appellants under Sec. 307 read with Sec. 34 I.P.C. and sentenced each of the appellants to suffer rigorous imprisonment for 5 years and fine of Rs.2,000/- in default rigorous imprisonment for six months which has given rise to file this appeal by the appellants.

Learned advocate Mr.Tejas D Karia for the appellants and learned A.P.P.Mr.A.J.Desai for the respondent-State of Gujarat have taken us through the entire record and proceedings. The learned advocate for the appellants has submitted that the evidence led by the prosecution did not prove beyond reasonable doubt that all the appellants had common intention of causing murder of deceased Fakirmohmed and to launch murderous assault on p.w. 2 Bhikhankhan. Counsel submitted that the prosecution has not led sufficient evidence as regards meeting of minds of the appellants to fulfil their evil design of committing murder and launching murderous assault of Bhikhankhan. It is further submitted that the presence of the appellant no. 1 Mohmedkhan and appellant no. 3 Bhurekhan at the place of the incident and their participation was highly doubtful. It is further submitted that the appellants were falsely involved in the incident due to previous enmity and as they had tried to rescue original accused no. 4 & 5 from the assault by the deceased Fakirmohmed and his sons Bhikhankhan and Ashrafkhan who were the husbands of accused no. 4 & 5. In the alternative, it is submitted that there was no intention on the part of the appellants to cause the murder of deceased Fakirmohmed as only one blow was inflicted by the appellant no. 2 Amirbhai on the abdominal part of the deceased which unfortunately resulted into his death due to further complications and therefore this was not a case of murder under Sec. 302 of I.P.C. and at the most it would amount to an offence under Part I or II of Sec. 304 I.P.C. Counsel for the appellants further submitted that there were contradictions in the evidence of the complainant Saberaben as compared to the statement recorded of p.w. 2 Bhikhankhan by the Executive Magistrate wherein the involvement of the accused no. 3 Bhurekhan was highly doubtful. Counsel for the appellants further submitted

that the prosecution has not examined independent witnesses whose statements were recorded during investigation and had only projected one side story deposed by the interested and closely related witnesses. Counsel at the end submitted that as there were many contradictions in the evidence of the prosecution witnesses, benefit of doubt requires to be extended in favour of the appellants and appeal be allowed accordingly.

Learned A.P.P. Mr.Desai has submitted that the prosecution has established beyond doubt that there was previous enmity between the two families of Badarkhan and Fakirmohmed and due to the defeat of the election the appellant no. 3 Bhurekhan had grudge against p.w. 2 Bhikhankhan and therefore to take revenge on the family of the deceased Fakirmohmed, had pre-planned to launch murderous assault on Fakirmohmed and Bhikhankhan. It is submitted that there was a common intention on the part of all the appellants to commit the offences alleged against them. It is further submitted that the appellants had strong motive to launch the attack to take revenge of their sisters namely accused no. 4 & 5 who were driven out of their matrimonial home by p.w. 2 Bhikhankhan and his brother Ashrafkhan. It is submitted by learned A.P.P. that the prosecution had proved beyond reasonable doubt all the charges levelled against the appellants and therefore their conviction and sentence be upheld and the appeal be dismissed.

It may be mentioned that the incident in question had taken place around 8.00 a.m. on May 25,1993 at village Lalavada. It is said that p.w. 1 Saberaben w/o Himmatkhan who is the second son of deceased Fakirmohmed had witnessed the occurrence of the incident. As per the testimony of p.w. 1 Saberaben after the incident was over, she had gone to her field and had returned in the evening when she had lodged the FIR before p.w. 12 P.S.I.K.D.Chauhan around 17.15 hrs. on the same day. Thus, the FIR was lodged after gap of nearly nine hours and no satisfactory explanation is offered by the prosecution. P.W. 2 injured Bhikhankhan in his oral testimony deposed that he and Bhurekhan the appellant no. 3 had contested the Gram Panchayat election wherein the appellant no. 3 had lost and therefore he had grudge against the family of p.w. 2 Bhikhankhan. It has also come on the record that wife of Bhikhankhan namely accused no. 5 Meherbibi and the wife of Ashrafkhan namely accused no. 4 Nanniben were driven out of their matrimonial home. The reason behind their being driven out of the matrimonial home is not forthcoming but it is

an established fact that both the sisters namely accused no. 4 & 5 were residing at their brothers' place at the time of the incident. From the above facts, it is obvious that the relations between the family of Badarkhan and Fakirmohmed had become strained. The evidence of p.w. 1 Saberaben and the evidence of P.W. 2 Bhikhankhan who is the injured witness proves beyond reasonable doubt that the accused no. 2 who was armed with knife had caused fatal blows on the deceased Fakirmohmed on his abdominal part which has resulted into his death. With regard to the participation of the appellant no. 3 there are many contradictions in the evidence of the prosecution. As per the oral testimony of p.w. 1 Saberaben, the accused no. 4 & 5 were giving fist blows on the deceased Fakirmohmed and when she reached near the deceased the appellant no. 1, 2 & 3 came there and the appellant no. 3 caught hold of the deceased by his neck and the appellant no. 2 had given a knife blow on the abdominal part of the deceased Fakirmohmed. At that time, p.w. 2 Bhikhankhan had reached the place of the incident and had tried to intervene to rescue the deceased. As per the evidence of p.w. 1 Saberaben, the appellant no. 1 caught hold of Bhikhankhan and the appellant no. 2 had inflicted knife blows on his abdominal part. In the cross-examination, p.w.1 Saberaben admitted that the appellant no. 3 had filed a complaint against the family members of deceased Fakirmohmed for assaulting accused no. 4 Nanniben and accused no. 5 Meherbibi (his sisters) and that case was pending when the evidence of p.w. 1 was recorded.

As per the evidence of p.w. 2 Bhikhankhan, accused no. 4 & 5 were giving fist blows to the deceased Fakirmohmed and at that time, the appellants no. 1,2 & 3 came from the back side of the deceased and appellant no. 3 caught hold of the deceased by the neck and the appellant no. 2 had inflicted knife blows on the abdominal part of the deceased. It was deposed by the p.w. 2 that when he tried to intervene the appellant no. 2 had inflicted knife blow on his abdominal part and when he again tried to inflict another blow, he caught hold of the knife and he had sustained injuries on the fingers of his right hand. It is deposed that when he tried to intervene the appellant no.1 Mohmedkhan had got hold of him and had also inflicted knife injury on his chest. When p.w. 2 Bhikhankhan was admitted as an indoor patient in the Civil Hospital, Ahmedabad his statement was recorded by p.w. 9 Executive Magistrate Baldevbhai Patel. The said statement though was recorded as dying declaration had not become the dying declaration because p.w. 2 Bhikhankhan had survived but the statement

recorded by the Executive Magistrate is previous statement as per the provisions of Sec. 157 of the Evidence Act. In that statement, exh. 54 Bhikhankhan has stated that the mob had gathered near the cabin of one Janubhai at 8.00 a.m. on May 25, 1993. When he reached near the mob he saw that the appellant no. 2 Amirbhai was inflicting knife blows on the abdominal part of the body of his father Fakirmohmed. He ran to save his father and at that time he saw that his wife Meherbibi accused no. 5, Nanniben accused no. 4 wife of his brother, brother-in-law Mohmedkhan Badarkhan (accused no. 1) and other village people were in the mob. He stated that he tried to run away when his brother-in-law appellant no. 3 and accused no. 4 & 5 caught hold of him and the appellant no. 1 Mohmedkhan had inflicted two knife injuries. Before the Executive Magistrate p.w. 2 Bhikhankhan stated that when the appellant no. 1 Mohmedkhan tried to inflict third blow he caught hold of the knife and he sustained injuries on his right hand.

The prosecution had examined one Amjadkhan Imamkhan who had also witnessed the incident at p.w. 6 exh. 43. This witness was also related with the family of the deceased Fakirmohmed. The evidence of this witness reveals that the accused no. 3 Bhurekhan caught hold of the neck of Fakirmohmed and the appellant no. 2 Amirbhai inflicted knife blow on Fakirmohmed. With regard to the injuries inflicted on p.w. 2 Bhikhankhan, the witness deposed that the appellant no. 1 Mohmedkhan caught hold of the p.w. 2 Bhikhankhan and appellant no. 2 had inflicted knife blow on Bhikhankhan and when he tried to inflict another knife blow Bhikhankhan caught hold of the knife. He further deposed that the appellant no. 1 Mohmedkhan had also inflicted knife blow on the chest of Bhikhankhan.

The evidence of the witnesses as discussed above proves that there was a dispute between the family of the deceased Fakirmohmed and Badarkhan. The dispute had started after the election was fought by p.w. 2 Bhikhankhan and appellant no. 3 Bhurekhan wherein Bhurekhan had lost the election. After that two sisters of the appellants were driven out of their matrimonial home and were staying at the place of the appellants. The appellants had a grudge against the deceased Fakirmohmed and they wanted to take revenge on p.w.2 Bhikhankhan as he had won the election. As per the defence version the incident started when Ashrafkhan, youngest son of deceased Fakirmohmed had assaulted accused no. 4 & 5 in their field and when Ashrafkhan had tried to cut the nose of Nanniben who was his wife.

Complaint was lodged by appellant no. 3 against the family members of the deceased Fakirmohmed and the case was pending in the Court. It may be stated that the present incident had taken place at 8.00 a.m. whereas the FIR was lodged by p.w. 1 Saberaben at 17.15 hrs. i.e. after delay of 9 hours. The previous statement of p.w. 2 Bhikhankhan recorded by the Executive Magistrate produced at exh. 54 reveals that the appellant no. 2 Amirbhai Badarkhan had inflicted knife injury on the deceased Fakirmohmed. This statement did not implicate the appellant no. 3 Bhurekhan that he, by catching hold of the neck of the deceased Fakirmohmed, had facilitated the appellant no. 2 in inflicting knife blows on the abdominal part of the deceased. The evidence of p.w. 1 Saberaben also contradicts the involvement of appellant no. 3 with the commission of the offence of murder of deceased Fakirmohmed. The evidence with regard to catching hold by the appellant no. 3 of the neck of deceased Fakirmohmed is highly doubtful. The contradictory version of the witnesses also raises serious doubt in our mind that the appellant no. 3 had caught hold of the neck of the deceased while the appellant no. 2 was inflicting knife blows. However, on the appreciation of oral as well as the documentary evidence, we are of the view that the involvement of the appellant no. 1 & 2 for causing murder of deceased Fakirmohmed is proved beyond doubt. It is worthwhile to be noted that only one blow was inflicted on the abdominal part of the body of the deceased Fakirmohmed by the appellant no. 2. The evidence of p.w. 10 Dr.Ghasura who performed the operation on the deceased in the Civil Hospital, Ahmedabad discloses that if no further complication had arisen the deceased would have survived as the injury caused by the knife was not fatal. The evidence of Dr.Ghasura reveals that the deceased was suffering from old disease of tuberculosis and his lungs had become very weak. He further deposed that x-ray report revealed that there was fibrosis in both the lungs which show that the functioning of the lungs had become very poor. The evidence of p.w. 13 Dr.Vijay Shah who had performed the post-mortem of the body of Fakirmohmed indicate that the injuries sustained by the deceased on the intestinal part, if were treated immediately he could have survived. His evidence further shows that deceased succumbed to the injuries because of other reasons namely his lungs had become very weak and complications had arisen after the operation. The medical evidence, thus indicate that the injury inflicted on the deceased was not fatal and the deceased could have survived if timely treatment was given to him. The other cause of the death was complications and other physical deficiencies of

lungs and old disease of tuberculosis. So from these facts and the evidence it can be safely held that the intention of the appellant nos. 1 & 2 was not to cause the murder of the deceased Fakirmohmed. Therefore, the offence of causing the death would not fall under Sec. 302 of I.P.C. but it would fall under Sec. 304 Part I of I.P.C.

Counsel for the appellants has vehemently submitted that there was no common intention of the appellant nos. 1 & 2 to cause the murder of the deceased Fakirmohmed and to launch murderous assault on the p.w. 2 Bhikhankhan. We have already discussed the oral evidence of the prosecution which indicates that there was previous enmity between the two families and the way the appellant no. 1 & 2 came armed with knife, it can be held that both the appellants had common intention to launch murderous assault on deceased Fakirmohmed and on p.w. 2 Bhikhankhan. The participation of the appellant no. 1 & 2 in causing injuries to p.w. 2 Bhikhankhan is also proved beyond reasonable doubt. The evidence of p.w. 1 Saberaben supported by evidence of p.w. 6 Amjadkhan Imamkhan also proves beyond reasonable doubt that the appellant no. 1 & 2 had common intention of causing injuries on the body of p.w. 2 Bhikhankhan. The injury certificate of p.w. 2 Bhikhankhan shows that the witness had sustained grievous injuries. The evidence of p.w. 4 Dr.Ritaben Shah, Medical Officer of Civil Hospital shows that p.w. 2 Bhikhankhan was examined by her at 1.10 p.m. on May 25, 1993 in the Civil Hospital at Ahmedabad. The injury certificate of p.w. 2 Bhikhankhan and the evidence of Dr. Ritaben Shah reveals that the injured was discharged from the Civil Hospital on June 4, 1993. She deposed that no complication had arisen during the treatment and therefore the patient was discharged as fully recovered on June 4, 1993. The fact remains that knife blow was inflicted on the delicate part of the body of p.w. 2 Bhikhankhan as a result of which praetorium was cut and sutures had taken to prevent loss of blood. The evidence of the injured himself also reveals that the appellant no. 2 had inflicted successive knife blows on the injured. The other blows were given when the injured caught hold of the knife by his right hand as a result of which he had sustained injuries on the fingers of his right hand. The participation of the appellant no. 1 for launching murderous assault on p.w. 2 Bhikhankhan is also proved by the occular evidence of injured himself as well as p.w. 1 Saberaben. The medical evidence of Dr.Ritaben also corroborates the testimony of injured himself that the appellant no. 1 Mohmedkhan had given knife blow on

his chest. The injury found on chest of the injured Bhikhankhan also gets established. The blood which was found on the muddammal knives as per the report of the serologist also corroborates that the appellant no. 1 & 2 had inflicted knife blows and the blood detected was of the group of deceased Fakirmohmed and injured Bhikhankhan. Thus, we are of the opinion that the conviction of the appellant no. 1 & 2 for the offence under Sec. 307 read with Sec. 34 of attempt to commit murder of p.w. 2 Bhikhankhan deserves to be confirmed. However, as the presence and the participation of the appellant no. 3 in the incident is not proved beyond doubt, reasonable benefit of doubt deserves to be given to the appellant no. 3 for committing offence under Sec. 307 read with Sec. 34 of I.P.C.

It is borne out from the record of this case that initially when the FIR was lodged, names of appellant nos. 4 & 5 were not mentioned as accused persons but subsequently while making further statement before the I.O., complainant p.w. 1 Saberaben had involved accused no. 4 & 5 implicating them with the incident in question. Learned Addl.Sessions Judge has rightly acquitted the accused no. 4 & 5 from the charges framed against them. This circumstance fortifies our belief that the complainant had tried to involve the appellant no. 3 Bhurekhan with the incident of committing murder of Fakirmohmed and launching murderous assault on p.w. 2 Bhikhankhan. The late filing of FIR also justifies our view that the complainant after due deliberation had tried to falsely involve the appellant no. 3 Bhurekhan with the offences in question. Due to contradictory version of the injured p.w. 2 Bhikhankhan and his previous statement recorded by the Executive Magistrate also creates doubt in our mind that the appellant no. 3 was involved in the present incident. Therefore, reasonable benefit of doubt requires to be extended in favour of appellant no. 3 and therefore the conviction and sentence imposed on the appellant no. 3 for offences under Sec. 302 read with Sec. 34 of I.P.C. and for the offences under Sec. 307 read with Sec. 34 of I.P.C. deserves to be quashed and set aside. Consequently, the sentence imposed of rigorous imprisonment for life and fine of Rs.2,000/- in default rigorous imprisonment for six months for offence under Sec. 302 read with Sec. 34 of I.P.C. and the sentence imposed of 5 years and fine of Rs.2,000/- in default rigorous imprisonment for six months for offence under Sec. 307 read with Sec. 34 of I.P.C. also deserves to be quashed and set aside.

As a result of the foregoing discussion, this

appeal is partly allowed.

The conviction and sentence imposed on the appellant no. 1-Shaikh Mohmedkhan Badarkhan & appellant no. 2-Shaikh Amirbhai Badarkhan for the offences under Sec. 302 read with Sec. 34 of I.P.C. is altered and instead they are convicted under Sec. 304 Part-I read with Sec. 34 of I.P.C. and sentenced to rigorous imprisonment for ten years and pay fine of Rs.1,000/- in default simple imprisonment for three months. The conviction of the appellant nos. 1 & 2 for offences under Sec. 307 read with Sec. 34 of I.P.C. and the sentence imposed on them for rigorous imprisonment for 5 years and fine of Rs.2,000/- in default rigorous imprisonment for six months is confirmed. Both the sentences imposed on the appellants no. 1 and 2 shall run concurrently.

The conviction of appellant no. 3 Shaikh Bhurekhan Badarkhan under Sec. 302 read with Sec. 34 of I.P.C. and under Sec. 307 read with Sec. 34 I.P.C. and the sentence imposed on him is quashed and set aside by giving him reasonable benefit of doubt. The appellant no. 3 is on bail. His bail bonds shall stand cancelled. Fine if paid by him shall be refunded.

Muddammal be destroyed in terms of the directions contained in the impugned judgment.

(M.H.KADRI, J)

(SHARAD D DAVE, J)

srilatha